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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 532nd MEETING

Held at Headquarters, New York,
on Wednesday, 8 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

94-80910 (E)

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The meeting was called to order at 10.20 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

1. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 6 of the draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1) said that there would not necessarily be only one preparatory conference; it was conceivable that several conferences might be held in succession. Therefore, it was necessary to modify paragraph 6, and possibly paragraph 31, accordingly.

2. Mr. OLIVENCIA (Spain), referring to the wording of paragraphs 1 and 2, said that while the intent of the drafters had been correct, the text appeared to establish the precedence of an arbitration agreement between the parties over national arbitration legislation. In the case of a conflict, however, it was clearly national arbitration legislation, which was an element of positive law, that ought to take precedence over an arbitration agreement, which was purely contractual in nature. It might be useful to spell out that point in the text. He agreed with the representative of Mexico with regard to paragraph 6. As to the issues that should be taken up at the preparatory conference or conferences, it might be dangerous to discuss substantive issues, since they would be decided by the arbitral tribunal. The wording of paragraph 33 was thus somewhat ambiguous. With regard to paragraph 6, it was up to the arbitral tribunal to determine the advisability of holding a pre-conference hearing in the light of the specifics of each case; a preparatory conference was not always necessary and, as the representatives of China and France had already noted, it was a practice that should not be made general.

3. Mr. LOBSIGER (Observer for Switzerland) said he was particularly pleased with the quality of the documents prepared by the secretariat - given that Zurich and Geneva were two cities that had many arbitral tribunals; Switzerland was thus following the matter closely. The "annotated check-list" (A/CN.9/396/Add.1, chap. III) might be quite useful at all stages of arbitral proceedings, even later on in the process. The issue of whether the preparatory conference should be limited to questions pertaining to format or the organization of negotiations was a very real one: how were the parties to be prevented from discussing issues of substance, particularly if they were present at the preparatory conference? Furthermore, as already noted, there was a risk that the arbitral proceedings might be in conflict with national legislation.

4. Mr. HERRMANN (Secretary of the Commission) noted that Switzerland had made a significant contribution to the preparation of the documents, since a Swiss arbitration specialist had taken part in that effort.

5. Ms. VERRALL (United Kingdom) sought clarification from the representative of Spain as to whether he thought that the convening of preparatory conferences prior to arbitral proceedings should be encouraged.

6. Mr. OLIVENCIA (Spain) said that a preparatory conference was in no way compulsory. While it might be useful for the parties to hold preparatory conferences, that practice should not be encouraged or made general, since it was up to the arbitral tribunal to determine the advisability and usefulness of such conferences in each specific case.

7. Mr. WANG Dianquo (China) said he did not believe that paragraph 4 of the draft Guidelines was the place to discuss the planning of proceedings by the arbitral tribunal. Preparatory conferences should be conducive to a harmonious understanding between the parties, the lawyers and the members of the tribunal, and if proceedings were not well planned, the consequences could only be negative. In the absence of adequate planning, arbitral proceedings were not very likely to produce the desired outcome.

8. Mr. CHATURVEDI (India) said that document A/CN.9/396/Add.1 should draw the attention of the parties and the arbitrator to certain substantive questions that had to be discussed before a dispute was settled through arbitration. It would be more appropriate to refer to "preparatory meetings", since the word "conference" evoked a gathering of several participants. As the observer for Switzerland had noted, the check-list in chapter III would highlight fundamental questions and indicate when they should be considered.

9. Mr. SEKOLEC (International Trade Law Branch) said that the expression "preparatory conferences" had been chosen instead of "preparatory meetings" because it had been thought that the word "meeting" conveyed the idea of a physical gathering, with the parties and the arbitrators coming in person to a meeting place. However, the draft Guidelines indicated that such consultations could also take place via telecommunications, a concept which the word "meeting" seemed unable to convey.

10. Mr. CHATURVEDI (India) said that the word "conference" did not exclude the use of telecommunications and had exactly the same connotation as the word "meeting", namely "physical encounter".

11. Mr. CHOUKRI SBAI (Morocco) said that, as its title indicated, the document under consideration consisted of draft guidelines. Guidelines were neither compulsory nor binding, nor was recourse to a preparatory conference which was why he considered the document to be useful and approved of it entirely. In fact, it could be used not only in international arbitral proceedings, but also in national proceedings. Morocco had made arbitration part of its legislation and used it in both commercial and other civil cases. Preparatory conferences or meetings were very useful. Arbitration was in fact an altogether different area from the legal sphere. In a trial, lawyers or attorneys attempted to convince not only judges but also their clients of their professional abilities and competence. They had, to a certain extent, something to sell. Arbitration, on the other hand, was a secret and confidential procedure in which one could better express one's ideas and avoid any tension. Furthermore, recourse to arbitration was completely optional. While his delegation did have some reservations regarding certain aspects of the document under consideration, it was not as pessimistic as the French delegation and fully supported all the guidelines contained therein. Indeed, the document made it possible to assist the parties without imposing any solutions or procedures on them.

12. Mr. TUVAYANOND (Thailand) said that his delegation greatly appreciated the work done by the secretariat in preparing a set of highly useful guidelines. While the principle of preparatory conferences was justified, it should not be compulsory. A conference should be held only when necessary and when the advantages it offered justified the cost and time involved. Instead of the word "conference", his delegation preferred the word "consultations", which could easily be applied to electronic mail communications. As stated in paragraph 20 of the draft Guidelines, a preparatory conference was often convened on the initiative of the arbitral tribunal or the presiding arbitrator. In Thailand's view, the arbitrator could not convene a conference or meeting without good reason, and would not do so if the parties did not believe such a conference would be useful. His delegation did not see how a conference could be convened in disregard of the parties' reservations or objections. Arbitral proceedings depended on the ability of the parties to agree on the rules of those proceedings or even to let the arbitrators determine them. In other words, the parties had complete control; it was up to them to determine the procedure that would be followed and even to authorize arbitrators to rule on the basis of equity and not solely on the basis of legal precepts. The two parties could make use of the preparatory or preliminary consultations to raise their reservations and objections and provide the necessary clarifications to the arbitral tribunal or presiding arbitrator.

13. Mr. HOLTZMANN (United States of America), referring to the comments made by the representative of the secretariat, said that his delegation was in favour of using the word "conference" in the draft text submitted by the secretariat. In his delegation's view the word "conference" also suggested the possibility of negotiations and compromise. The agenda items proposed in chapter III frequently used the expressions "enquire whether the parties" or "seek opinion from the parties". The word "conference" was preferable to "consultations", because the latter term could lead to the conclusion, which had in fact been drawn by the representative of Thailand, that the two parties must agree to the holding of a meeting and to the ensuing procedural arrangements. It should be possible to hold such conferences if the tribunal so desired, and no party should be able to prevent them from being held because it wished to disrupt the proceedings and resort to delaying tactics, as often happened in arbitral proceedings. The two parties would naturally have the ability to prevent an arbitral tribunal from holding a hearing. Article 15 of the UNCITRAL Arbitration Rules provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate, which seemed to indicate that the parties could not prevent a hearing from being held prior to a preparatory conference. On the other hand, it must be remembered that article 1 of the UNCITRAL Rules preserved the right of the parties to modify those Rules in order to prevent arbitrators from holding a preparatory conference. Only in that way could the parties prevent the holding of a conference, although that would be an exceptional situation that did not need to be dealt with in the commentary.

14. Mr. SHIMIZU (Japan) said that he, too, wished to thank the secretariat for its excellent work. He would welcome clarification of the use of the expressions "procedural law" at the end of paragraph 2 and "law applicable to the arbitration" in paragraph 18 of the draft Guidelines. He wondered whether

that difference in terminology was deliberate and, if so, what its significance was.

15. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not see the two terms as referring to different concepts. The term "procedural law" should not be confused with the term "law on procedure", the rules of procedure applicable to hearings or trials, in other words, to the code of civil procedure. Some delegations had suggested that the term "law applicable to the arbitration" might also cover substantive questions. It would be wrong to interpret that expression as referring to the law applicable to the substance of the litigation that was the subject of the arbitration. Indeed, the intention was to refer throughout the text of the draft Guidelines to the procedure that governed the arbitration, a notion which could be rendered, for example, by a term such as "arbitration law".

16. Mr. FOUCHARD (France) said that he shared many of the views expressed by the representatives of Spain, China and Thailand. He was pleased to note that the secretariat's understanding of the term "conference" covered cases in which there would be no physical meeting. It was clear that consultations by means of telecommunications were not only still possible, but inevitable. It was difficult to understand how an arbitral tribunal could conduct a proceeding without communicating with the parties' legal counsel as to its organization. If the Commission could be satisfied with the term "consultations", there would be no need for further discussion, and it would simply have to draft a guide or some kind of user's manual, as the representative of the United States of America had suggested, which might include the "check-list" of topics to be considered by the tribunal. Unfortunately that was not the case and there was still a strong tendency, if not to impose, at least strongly to suggest that, conferences or physical meetings should be held at the outset of the proceedings.

17. With regard to the discussion on section A of chapter I, one had to wonder, as the representative of Thailand had noted, what would happen if one party refused to participate immediately in a conference. The representative of the United States of America had said that the arbitral tribunal could disregard that refusal, since it had the power to do so in general under the terms of the UNCITRAL Arbitration Rules. Such an attitude would hardly be desirable. It was possible that the refusal to participate in a preliminary conference at the outset of the proceedings might be justified by a party's fear of having to "show its hand" right away while the other side's case and position were still unknown, or simply by its wish to buy some time for reflection. Nevertheless, the conference would take place by default. The position of the two parties - generally that of the respondent - would thus be hardened into an attitude of refusal which would jeopardize all subsequent cooperation. The problem was a serious one, and even if the opinion of the representative of the United States of America was justified in law, it could be dangerous in practice.

18. On the question of whether preliminary conferences were widespread, paragraph 8 indicated that they would be more frequent when the parties assumed a high degree of procedural initiative. It was clear that the focus was on procedures derived from common law and from the production of evidence in common law, more specifically the procedure known as discovery. That procedure often

imposed on State jurisdictions methods of pre-trial discovery which, while not without merit, were nevertheless cumbersome and complex. He did not mean to criticize such procedures but merely to suggest that it might be dangerous to try to generalize them or to apply them to international arbitration. It was important to note that two major rules of two major arbitration institutions, the American Arbitration Association, in its rules governing international arbitration, and the London Court of International Arbitration, also in its international rules, had been careful not to mandate preliminary conferences or a preliminary hearing on evidence or an obligation to produce evidence. That had been done so as not to exclude parties from other legal cultures. The Guidelines before the Commission stated that the aim of UNCITRAL was harmonization. He wondered whether it was really advisable to impose on practitioners of arbitration from Europe, Africa, Latin America and many Asian countries - in other words, practitioners who represented the cultures of a large number of civil law countries - the discussion of evidence which was central to the check-list of possible topics for preparatory conferences contained in chapter III. Hearings on evidence did not exist in European practice, and it was to be feared that, by seeking, under the pretext of harmonizing, to impose a solution which was neither the one provided for in the UNCITRAL Arbitration Rules nor the one in the American and British rules on international arbitration, serious difficulties might be created instead. Article 15 of the UNCITRAL Arbitration Rules gave the arbitral tribunal the power to conduct the proceedings as it considered appropriate. Article 25 stated that the tribunal was empowered to rule on evidence and its admissibility. Introducing, through such preliminary conferences, a hearing and initial arrangements - or even initial arguments - concerning evidence would run counter to the objective of harmonization.

19. Mr. GOH (Singapore) said that, like the representative of the United States of America, he preferred the word "conference" to "meeting". Several international arbitral rulings had been rendered in Singapore in recent years, and it was not uncommon for the defendant to do all he could to delay the outcome of the proceedings for as long as possible.

20. Mr. ABASCAL ZAMORA (Mexico) noted that, in the Spanish version of document A/CN.9/396/Add.1, the English word "conference" should be rendered by "conferencia" and not "reunión". It was important to note that arbitrators could communicate long-distance and that it was not essential for them to meet. The guidelines clearly stipulated that preliminary conferences should respect the arbitration rules agreed upon by the parties as well as the laws applicable to arbitration and the will of the parties. The parties could object to the holding of a preparatory conference, but it was the arbitrators who made the final decision while ensuring, in conformity with article 15 of the UNCITRAL Arbitration Rules, that the parties were treated with equality and that they were given every opportunity to assert their rights and to propose their methods.

21. Mr. TUVAYANOND (Thailand) said that once an agreement had been reached, it would be necessary to prevent delaying tactics. Taking a decision by default, however, would mean imposing one party's point of view on the other party and unilaterally modifying the arbitration rules, in violation of international law. Moreover, since preparatory conferences were supposed to deal only with

questions of procedure, and given that their cost was too high for the poorest countries and that they might result in a loss of time, they should be held only if they were really justified. If a conference did take place, refusal to participate should be considered as proof of bad faith in order to discourage delaying tactics.

22. Mr. AL-NASSER (Saudi Arabia) said that the only concern of the authors of the draft Guidelines was to improve the arbitration procedure and to make it more effective. They considered, however, that preparatory conferences were indispensable. Such conferences, which sought only to clarify procedure, were a common practice in Saudi Arabia and in international litigations to which Saudi Arabia was directly or indirectly a party. Moreover, the parties would always be free to accept or refuse a preparatory conference. As for the term that should be used to designate them, that was a matter of secondary importance.

23. The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

24. Mr. CHATURVEDI (India), returning to the question raised by the representative of Japan concerning the terms used in the last sentence of paragraph 2 and in paragraph 18, said that the texts would be clearer if in paragraph 2 the term "procedural law" was replaced by "procedural rules". He also wondered whether there was not a contradiction between paragraph 3 and the first point raised in paragraph 2.

25. Mr. CHOUKRI SBAI (Morocco) said that, in his country, the words "meeting" and "session" implied the presence of the parties, while the word "conference" was used for cultural, political or scientific gatherings. It would therefore be best to use the word "deliberation". That term would be well suited to long-distance communications, which did in fact save time and money.

26. Paragraph 21 offered a satisfactory response to the question of what should be done when one party objected to the holding of a preparatory conference. However, the following paragraph suggested that a preparatory conference might take place despite the objections of one of the parties, which was contrary to the rules of arbitration. It should be made clear at the end of paragraph 22 that a preparatory conference could be held despite the reservations or objections of a party, provided that it was not prejudicial to the interests of that party, that it did not deal with questions of substance and that it respected the procedure or compromise agreed upon by the parties. In any case, the matter deserved further consideration.

27. Mr. TUVAYANOND (Thailand) said that preparatory conferences should be held only in exceptional cases and where they were genuinely useful, in other words indispensable for the proper conduct of the arbitration proceedings. Questions of substance should not be addressed in preparatory conferences, especially if one of the parties was absent, since such conferences did not give the parties a full opportunity of presenting their case. It was conceivable, however, that a decision might be taken on the substance, with the agreement of all the parties. Moreover, if the parties reached agreement on any point, that agreement must be mentioned in the document.

28. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said he shared the view of the representative of France that, broadly speaking, the current international arbitration rules did not make specific provision for the holding of preparatory conferences. Nevertheless, recourse was often had to that type of conference when arbitration proceedings were conducted under the arbitration rules of the International Council for International Arbitration, the London Court of International Arbitration, UNCITRAL or the American Arbitration Association, regardless of whether the tribunal or its presiding arbitrator operated under the common law system or under Roman law.

29. The fears expressed by some delegations that such conferences might result in higher costs were unwarranted, since the aim of the conferences was precisely to reduce some of the costs incurred by any arbitration proceedings. Naturally, it would be for all the parties to the proceedings to exercise close control over costs and to refrain from holding a conference if the costs were not justified. Moreover, experience had shown that most arbitration proceedings for which a conference had been carefully and effectively prepared had lower costs.

30. Mr. LEVY (Canada), referring to the notion of a preparatory conference in the context of an arbitration agreement, said that arbitration generally resulted from the provisions of a commercial agreement between the parties which frequently stipulated only that any dispute would be settled by arbitration, without establishing any type of procedure and certainly without providing for a preparatory conference. It was therefore dangerous to proceed as if the parties always agreed to settle questions of all kinds and perhaps to render a preparatory conference useless. It must be specified, then, that in certain cases, where the parties had recourse to arbitration, they did so solely on the basis of a contractual arrangement which stipulated that all litigation must be submitted to arbitration. Those hypotheses were therefore arguments in favour of the holding of preparatory conferences.

31. Mr. TUVAYANOND (Thailand) reiterated his view that there were actual cases in which the arbitration agreement was silent on the procedure, so that the parties were forced to have recourse to preparatory conferences under the auspices of an arbitral tribunal. It was still often necessary to establish that a conference of that type was essential. To do otherwise would be inconsistent with the purpose of arbitration, which was to accelerate the search for a solution to the dispute, since both the workload and the cost of the proceedings would be increased.

32. Ms. VERRALL (United Kingdom) supported the views expressed by the observer for the International Council for Commercial Arbitration; in fact, the purpose of preparatory conferences was to accelerate the arbitral proceedings and reduce costs. The requirement suggested by the representative of Thailand was therefore lacking in logic.

33. Mr. SEKOLEC (International Trade Law Branch) said he was surprised that the current draft Guidelines should have given the false impression that preparatory conferences were the only or the best method of settling questions of procedure during arbitration; in fact, the text suggested that there were other options (consultations between the arbitrators by themselves, no meetings at all between

the parties when, for example, they had reached agreement on the approach to follow and the questions to put to the arbitral tribunal, etc.). There was no doubt that, like all human activities, arbitration benefited from being well prepared, and preparatory conferences could be the mechanism that was best suited to that purpose and, consequently, the preferred mechanism; but they represented only one of many modalities for preparing the proceedings. Moreover, problems of terminology could be resolved and the expression "preparatory meeting" used, for example, to designate any meeting in which the parties participated in person, while "preparatory conference" or "preparatory consultations" could be used as a generic term.

34. Mr. CHOUKRI SBAI (Morocco) suggested that, for reasons of consistency, the expression "preparatory deliberations" should be used to refer both to meetings at which the parties were physically present and to consultations, communications and telecommunications; all references to meetings or consultations would thus be avoided.

35. Mr. HOLTZMANN (United States of America) observed that the term "deliberations" had a very precise meaning, especially in the field of international arbitration. It referred to the discussions which the arbitrators held among themselves with a view to reaching a decision and was therefore inappropriate in the context of preparatory conferences.

36. Mr. OLIVENCIA (Spain) suggested that consideration should be given to the proposals made by the secretariat in paragraphs 10 and 11 of the draft with regard to the term "preparatory conference".

37. Mr. ABASCAL ZAMORA (Mexico) said that, in addition to the different terms used, it might be useful to define the concept of "preparatory conference" to make it clear that it referred to a meeting which could be held after the constitution of the arbitral tribunal and whose purpose was to prepare the arbitral proceedings.

38. Mr. OLIVENCIA (Spain) said that he shared the view of the representative of Mexico. He also suggested that the Spanish version, which used the term "preparatory meeting", should be brought into line with the English and French versions, which referred to "preparatory conferences". Furthermore, in so far as the term did not always refer to a meeting of persons in the proper sense, his delegation was ready to agree to the use of the term "preparatory conference", which had a much broader sense in the context of arbitration. The term "deliberations", on the other hand, which referred to an intellectual exchange between the arbitrators aimed at reaching a decision, was obviously unsuitable in that context. The best expression was clearly "conference".

39. Mr. TUVAYANOND (Thailand) said that, in light of the statement made by the representative of Canada, the adjective "preparatory" would be more appropriate than the adjective "preliminary" or the expression "pre-hearing". He therefore supported the use of the term "preparatory conference".

40. Replying to the representative of the United Kingdom, he said that if the preparatory conference was not essential, it would in fact be tantamount to

adding another phase to the arbitral proceeding and thus to delaying those proceedings and multiplying their cost.

41. Mr. GRIFFITH (Observer for Australia) said he agreed with the representative of Spain that section B could be entitled "Terminology - preparatory conference" in order to reflect the content of paragraphs 10 and 11 more accurately.

The meeting rose at 1 p.m.

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SUMMARY RECORD OF THE 533rd MEETING

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter I, section C

1. Mr. OLIVENCIA (Spain), referring to paragraph 12, said that the Spanish version of the draft guidelines must refer to preparatory conferences in the plural.

2. Paragraph 13 should clearly indicate that harmonized international guidelines helped in determining whether or not to hold a preparatory conference, how such a conference should be prepared and the topics to be dealt with. The Spanish version of the text, which, unlike the other language versions, used the imperative, must be corrected. Indeed, the use of the indicative in the words "estas directrices explican cuáles deben ser los objetivos de una reunión preparatoria y ... los temas que deben considerarse en esas reuniones" was unsuitable in a text on guidelines.

3. According to paragraph 14, the Guidelines would contribute to the dissemination of knowledge about arbitration and foster better understanding and harmonization of arbitration procedures. They could also contribute to the dissemination of the advantages of arbitration as a procedure different from judicial procedures.

Section D

4. Mr. HOLTZMANN (United States of America) said that chapter I, section D, was the first section containing texts in square brackets, which meant that the deletion of the bracketed portions would not adversely affect the aim of the guidelines.

5. Paragraph 17 seemed to suggest that the parties had to be asked at the beginning of the arbitral proceedings whether they wished to add to or modify the agreed rules. He wondered why an arbitrator would again raise an issue that had already been settled if the parties themselves did not do so and there were no specific reasons for doing so. That would complicate the proceedings, and the task of modifying the rules entailed time, effort and money. The secretariat had rightly noted in paragraph 17 how difficult and dangerous it was to modify rules. Consequently, his delegation proposed that paragraph 17 and the final sentence of paragraph 16 should be deleted.

6. His initial reaction to paragraph 18 was that it repeated ideas that were already set out in paragraph 2. If its aim was to take substantive issues as well as procedural issues into consideration, then it might be useful. However, in view of the fact that his delegation had reservations regarding the inclusion of issues relating to the substance or merits of the dispute, it preferred to leave it to the secretariat to determine the matter based on how the discussions evolved.

7. Mr. LEVY (Canada) said that he agreed almost entirely with the previous speaker concerning the problems raised by paragraphs 16 and 17 and that the second sentence of paragraph 16 and paragraph 17 as a whole should be deleted. One idea in paragraph 17 should be retained, although not in its current form, since it raised the prospect of unnecessary activities at a preparatory conference.

8. The need to ensure that the Guidelines did not conflict with arbitration rules, particularly those of the arbitral institutions which had their own rules, could be met by retaining paragraph 18, to which the words "or the rules of the arbitral institution where the arbitration takes place" should be added.

9. Mr. ABASCAL ZAMORA (Mexico) said that in paragraph 15 of the Spanish text the words "conforme al reglamento de arbitraje" should be replaced by the words "dentro de los límites del reglamento de arbitraje".

10. While he agreed with the representative of the United States of America where paragraph 17 was concerned, he felt that the idea of recommending to the arbitrators and the parties not to make modifications to the arbitration rules should be retained. Otherwise counsel with more zeal than experience might create problems.

11. Mr. GRIFFITH (Observer for Australia) said that much of what was contained in the Guidelines could be described as discursive elucidation as opposed to a direct statement of principles. For the sake of users, it would be advisable to adopt a uniform style for all paragraphs that would begin with a statement of the applicable principle. Thus, paragraph 15 might begin with the sentence "A preparatory conference is to be carried out within the limits of the arbitration rules", adding afterwards that that was because the Guidelines were not binding and should not in principle violate the agreed rules. Similarly, paragraph 18 ought to start with the principle "The preparatory conference should not take any decisions that violate the provisions of the law applicable to the arbitration".

12. He agreed that it was not a good idea to invite the parties to make modifications and therefore supported the proposal to delete paragraph 17. The issue of taking decisions that entailed modifications or additions should also be borne in mind; the best solution there would be for the parties to work out an agreement in writing.

13. Mr. ZHANG Qikun (China) agreed with the representatives of Canada and the United States of America that the purpose of preparatory conferences was to speed up arbitral proceedings; that would be incompatible with the idea of allowing the parties to modify issues already agreed upon.

14. Mr. DUCHEK (Austria) shared the view that paragraph 17 had more drawbacks than advantages. However, instead of deleting it, a sentence should be added to caution the parties that any decisions they took pursuant to the Guidelines must be compatible with the procedural rules they had agreed to follow in the arbitration. In paragraph 18, the words "should not violate" should be replaced by the words "must not violate".

15. Mr. TUVAYANOND (Thailand) said that while he agreed in principle with the previous speakers, the principle of free will dictated that the parties could not be prevented from modifying any decision they had agreed on if they felt it was in their interest to do so. It would be incompatible with that principle for an arbitral institution, when administering an arbitration, to reserve the right not to accept any proposed modification of the rules. A possible exception might be found in the case of arbitration rules, which must be binding on the parties. He agreed that the words "should not violate" in paragraph 18, should be replaced by "must not violate". In paragraph 17, which had useful elements, the words "The parties should be mindful ..." at the beginning of the fifth sentence, should be followed by a provision to prevent any stalling tactics, as unnecessary delays should be avoided.

16. Mr. CHOUKRI SBAI (Morocco) said that he favoured retaining only the last sentence of paragraph 17, which could be inserted somewhere else. Whenever a modification of procedure was desired, such modification should be made in consultation with the arbitral tribunal. He also favoured merging paragraphs 16 and 18, since both of them were aimed at preventing a modification of the arbitration rules agreed by the parties. The provisions of paragraph 18 should not be incompatible with the law applicable to the arbitration. That would ensure the observance of both arbitration rules and applicable laws.

17. Mr. GRIFFITH (Observer for Australia) supported the suggestion to merge paragraphs 16 and 18.

18. Mr. SHIMIZU (Japan) said that the preparatory conference should not be organized solely within the confines of law applicable to the arbitration but also in accordance with established practice concerning the application of that law. He therefore suggested adding in paragraph 15 wording to the effect that the draft Guidelines were not meant to replace current practice.

19. Mr. LEVY (Canada) agreed that paragraphs 16 and 18 should be merged provided that the last two sentences of paragraph 16 were deleted. The text would then read: "The decision to use the Guidelines does not imply any modification of the arbitration rules that the parties may have agreed upon. It should be borne in mind that whatever decisions are taken as a result of the preparatory conference, they should not violate provisions of the law applicable to the arbitration that cannot be derogated from."

20. Mr. HOLTZMANN (United States of America) said that he had some reservations concerning the suggestion by the representative of Japan to refer to current practice. There was a consensus that whatever took place at a preparatory conference had to be in conformity with the rules and other agreements reached by the parties, while the term "practice" evoked uncharted territory.

Chapter II

21. Mr. GRIFFITH (Observer for Australia) proposed that the square brackets in paragraph 23 should be deleted. It was very important for the parties, witnesses and experts to participate in the arbitration, and while the presence at the preparatory conference of legal counsel ought to suffice, the possibility of letting the parties, experts and witnesses participate should be left open.

He also suggested that the word "procedural" after the word "tribunal" in the second sentence of paragraph 22 should be deleted.

22. Mr. ABASCAL ZAMORA (Mexico), referring to the Spanish text, said that the end of third line in paragraph 19 should read "flexibilidad y discrecionalidad". As the secretariat had noted, the reference in paragraph 20 first to "la norma procesal" and then to "el derecho procesal" gave rise to confusion. The words "normas de igualdad" in the fifth sentence of paragraph 22 should be replaced by "normas de equidad". In paragraphs 21 and 22, which dealt with cases in which one party objected to the holding of a preparatory conference or failed to participate in the conference, it would be preferable for the text to dissuade parties from objecting to or failing to attend preparatory conferences. Those paragraphs should stress that the Tribunal was empowered to rule on procedural issues provided that the parties were treated equally and were given a full opportunity to express their views. As it was, the current text gave the parties a great deal of latitude to object to the work of the tribunal or to obstruct it. The third sentence of paragraph 22 in particular even allowed the tribunal to suspend the conference, which would occasion additional expenditure or delays for the parties. A party must have well founded reasons for objecting to the holding of a preparatory conference, let alone failing to attend it.

23. Mr. LEVY (Canada) said that one of the reasons why alternate methods of dispute resolution such as arbitration were often used was to avoid the courts and the hard positions that were taken there. In the commercial world, the advantage of resolving a dispute by amicable means lay not only in savings of time and money but also in a possible continuation of the business relationship between the parties, whereas when the parties decided to turn to a court of law to resolve their differences, that probably meant the end of what might have been a good commercial relationship. For those reasons, it might be possible to expand paragraph 23, since the preparatory conference could afford the parties with an opportunity for settling their differences, given that it was frequently the first time that they met to discuss the dispute. In such cases, the arbitrators should not be present or involved in any way, because if they participated and the settlement talks failed, their position could be seriously compromised. It was impossible to be a mediator or conciliator and an arbitrator at the same time. It would therefore be useful if some way could be found to mention in paragraph 23 that if the parties were present at the preparatory conference, which was not always the case, they had an opportunity to settle their differences even before the arbitration proceedings began.

24. The wording of paragraph 24 seemed to imply that the need to hold preparatory conferences depended on the number of procedural issues to be resolved or their complexity. The decision to hold a face-to-face meeting was not necessarily based on those factors but rather on many others, such as the dynamics between the parties. Apart from face-to-face meetings, paragraph 24 should also mention that preparatory meetings could take other forms including conference calls, teleconferencing and facsimile communications.

25. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 23 was an example of material in square brackets which was clearly useful even though not absolutely necessary. As to its content, it should be reordered so as to indicate that when the parties were

represented by legal counsel or by agents it was usual for those representatives to be present at a preparatory conference; it should then be noted that on some occasions it might also be useful for the parties to be present, especially where the legal representatives needed to be given immediate instructions so that decisions could be taken during the conference. In the case of the second sentence, he was somewhat doubtful that the arbitral tribunal should indicate in the invitation to the conference that only legal counsel might be present, as that was for the parties to decide.

26. Mr. HOLTZMANN (United States of America) said, with respect to paragraph 23, that it would be unwise for arbitrators or UNCITRAL to consider telling the parties whom to bring to a hearing. If parties wanted to come without legal counsel, it was not for UNCITRAL to tell them that they should have brought their lawyer or to tell them that they should not come but only send their lawyers. That having been said, there seemed little left in paragraph 23. He therefore thought that the paragraph was unnecessary and took the Commission into areas it need not enter. However, if the secretariat felt that there was something valuable to be salvaged from paragraph 23, he would consider a new draft with interest.

27. The last sentence of paragraph 21, which said that "a negative attitude might indicate that a preparatory conference should not be held since it may not fully meet its objectives", should be deleted. The fact that one of the parties might object to the conference should not deny the arbitral tribunal or the other party the benefit of planning an efficient procedure. A preparatory conference could be especially important when one of the parties failed to appear because it was then that the arbitral tribunal needed all the help it could get, and it could only get that help from one of the parties. As one party could not stop an arbitration, there was an obligation on the arbitral tribunal to be particularly fair in such circumstances.

28. Mr. TUVAYANOND (Thailand) said that paragraph 23 might be useful, but the phrase "the arbitral tribunal may indicate in the invitation to the conference that" should be deleted, so that the sentence would read: "Sometimes, however, in view of the types of questions to be discussed, it would satisfy the objectives of the conference if only the legal counsel are present". The rest of the paragraph would remain unchanged and the brackets should be deleted.

29. As drafted, paragraph 22 could be dangerous. It would be strange for the arbitrators not to listen to the parties, because the power of the arbitrators came from the consent of the parties. If a party had a reservation or objection to a conference, whether justified or not, any decisions the arbitrators might make in the pre-hearing phase should be limited only to procedural matters; otherwise the principle that each party should be given a full opportunity to present its case would be violated. The preparatory conference should accordingly be limited to the preparation of the arbitration and not deal with the settlement of the dispute. Decisions on questions of substance should not be permitted in the preparatory conference, which could be convened, if need be, solely for the purpose of deciding procedural matters.

30. Mr. CHOUKRI SBAI (Morocco) said he agreed with the representatives of Canada, the United States of America and other countries that the part of

paragraph 23 referring to exceptions should be deleted. The arbitral tribunal could make that point clear during the proceedings. In his opinion, not only was the presence of the parties useful but their absence might prejudice their right to defend themselves. The parties had a right to be present, and it was they who should bear the burden of time and money involved in the arbitral proceedings. He therefore proposed that the drafting group should delete the brackets and leave only a single sentence in paragraph 23 reading: "The parties themselves, their legal counsel and any other representatives of the parties may participate in the preparatory conference".

31. Mr. OLIVENCIA (Spain) said that paragraph 19 took a negative approach in saying that the arbitral tribunal should "take care that the holding of a preparatory conference does not add unnecessarily to the costs of the proceedings or prove to be an administrative burden"; it should be reworded positively to emphasize the benefits of a preparatory conference. Preparatory conferences were acceptable only if they were or could be beneficial, and that decision was for the tribunal to make. Preparatory conferences were not essential, as no provision was made for them in arbitration rules and laws, but they could be useful, and it was that positive aspect of preparatory conferences on which guidelines for them should be based.

32. Paragraph 20 dealt with existing arbitration rules and laws. In addition to reflecting current reality, it would also be helpful to add that a preparatory conference should be convened after consulting the parties.

33. He shared the view that paragraph 23 should be retained but reordered. It was usual for legal counsel to participate in the conference, especially when they represented the parties, but the participation of the parties themselves or their representatives should not be ruled out. The question of who should participate in the conference could be decided on the basis of the subject-matter to be discussed.

34. As to whether the parties ought to participate in the first conference, where the issues to be discussed were determined, a question arose for which no uniform standard of judgement existed, that of whether questions relating to the substantive issues to be arbitrated could be discussed. In his view, such points could be dealt with and in practice were. That helped to bring the positions of the parties closer and eliminate questions in dispute, so that the conference became a useful means of mediation.

35. Mr. ZHANG Qikun (China) said that paragraph 23 should be kept. In order to remove the brackets, the portion of it relating to the subject of the conference should be redrafted to indicate the types of questions to be discussed so that the parties could decide who should represent them in the conference.

Section A

36. Mr. TUVAYANOND (Thailand) said that paragraph 25 expressed his delegation's view that a preparatory conference should be convened only when it was necessary, such as when, for example, a tribunal was uncertain of its mandate, and he therefore favoured keeping the paragraph in its present form.

37. In paragraph 27 reference was made to the possibility that the parties might not have a clear idea as to the manner of proceeding. That was strange, as the parties usually studied the arbitration rules before deciding which to apply and learned about the advantages and disadvantages of the various arbitral tribunals in existence before resorting to one of them. Moreover, it was usually the parties who decided for the tribunal the scope and contents of the tribunal's mandate and not the other way round.

38. Mr. SEKOLEC (International Trade Law Branch) explained that that provision, which was mentioned in the introduction to the draft Guidelines, was based on the assumption that there would be no doubt as to the mandate of the arbitral tribunal; the purpose of the consultations mentioned was to give the parties some guidance regarding the form the proceedings would take, in order to avoid any surprises. Arbitral rules frequently conferred broad discretionary powers on the tribunal as to the form the proceedings could take. Furthermore, the parties might have different expectations in that regard, especially if they came from different geographical regions with different legal traditions. Arbitral actions could take many forms, which was why the tribunal must tell the parties as precisely as possible how it was going to proceed, so that they could know what to expect and could better prepare for the actual arbitration.

39. Mr. GRIFFITH (Observer for Australia) noted that paragraph 25, which mentioned the possibility that convening a preparatory conference might not be a necessity, was contradictory to the title of section A ("Cases in which preparatory conference may be useful") and should be moved, perhaps following paragraph 11.

40. Mr. ABASCAL ZAMORA (Mexico) said that some arbitration rules referred to different techniques that made it possible to avoid the convening of a preparatory conference, such as sending questionnaires to the parties concerning their procedural expectations or requesting them to inform the tribunal in writing of their views on the particulars. He suggested that those techniques should be mentioned in section A.

Section B

41. Mr. OLIVENCIA (Spain) said that the title should be changed to read "Preparatory conferences", and the reference in any case should be to "a" and not "the" preparatory conference. It would also be appropriate to indicate in that section that the purpose of the conference always related to planning but not always to procedure. Moreover, in the Spanish text, the word "procedimiento" should be used rather than "proceso". Finally, he did not agree with the wording of the first sentence of paragraph 31, since the holding of more than one conference was not exceptional.

Section C

42. Mr. TUVAYANOND (Thailand) said that paragraph 33 was acceptable where it referred to decisions on questions of procedure; only the tribunal, however, could take decisions concerning the substance of the dispute, with the agreement of all the interested parties. In order to be able to remove the brackets, then, the paragraph should be redrafted in order to reflect that principle.

43. It would be appropriate to combine the two approaches mentioned in paragraph 34. In other words, decisions would be taken in consultation with the parties and, if they were related to the questions that should be added to the document previously signed by the parties, another agreement could be concluded that would become an integral part of the original agreement.

44. Mr. HOLTZMANN (United States of America) also favoured the deletion of paragraph 33, since the substance of the dispute should not be discussed at the preparatory conferences. If it was retained, the word "merits" should be used instead of "substance" in the English text. The latter expression was ambiguous and might cause problems, since lawyers did not always agree on where to draw the line between questions that dealt with procedure and those that did not.

45. In paragraph 35, the second sentence undermined the principle that the arbitral tribunal enjoyed much latitude in determining procedure, and it should therefore be reworded in accordance with that principle. Specifically, it should indicate that the tribunal could take decisions at the conference without any need for agreement between the two parties. Finally, he had consulted the American Arbitration Association with regard to the second sentence of paragraph 36, about which he had some reservations. In fact, that sentence did run counter to the general purpose of preparatory conferences, which was to prevent the flexibility of the arbitral process from resulting in unpredictability. Furthermore, the preparations for an arbitral proceeding eventually reached a stage where the parties should know for certain what procedure would be followed. Consequently, firm decisions had to be taken on the matter at that stage, so that the parties could prepare for the proceeding. Naturally, the tribunal had the right to change its decisions if circumstances changed. Therefore, if a reference was to be made to that right, it should be in the introduction to paragraph 36 and not in the second sentence, which should emphasize the need for the tribunal to take specific decisions on matters of procedure.

46. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 33 was neither necessary nor particularly useful and could be deleted. If it was retained, it should be amended as suggested by the United States of America, bearing in mind the reservations expressed by Thailand concerning the determination of disputed issues. The distinction between a meeting between the parties and the arbitrators and a hearing or trial was that the latter gave each party a formal opportunity to formulate its allegations.

47. Mr. OLIVENCIA (Spain) favoured amending paragraph 33 rather than deleting it. If the text was amended in accordance with the suggestions made by the representative of the United States of America and the observer for the International Council for Commercial Arbitration, there would be no need to refer to decisions on matters of substance. Rather, the possibility that the conference could address matters that were not strictly procedural but referred to the materia decidendi and the petitions of the parties should be mentioned.

48. It was important that controversial issues and undisputed questions of fact or law should be defined at the preparatory conference, as provided for in sections D and E of the check-list of possible topics for the conference; the

point was to delineate what must be decided and what must be proven, but not to take decisions on the substance of the matter.

49. Mr. AL-NASSER (Saudi Arabia), referring first to paragraph 33, supported the comments of the United States of America and the International Council for Commercial Arbitration and suggested that, if the paragraph was retained, the phrase "if these questions are not defined by the parties to the dispute" should be added.

50. The last sentence of paragraph 34 should be deleted, since preparatory conferences should concern themselves with matters of procedure.

51. The text of paragraph 35 gave the impression that it was in contradiction with paragraph 34, because it raised the possibility of an arbitral tribunal adopting a decision without taking into account the parties to the dispute.

52. Mr. LEVY (Canada) said that the section under consideration could make reference to the possibility of the parties deciding at a preparatory conference to refuse the recourse of appeal to a tribunal when authorized by the applicable legislation. The question of the recognition or enforcement of arbitral judgements should also be borne in mind; articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration referred to that matter.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 534th MEETING

Held at Headquarters, New York,
on Thursday, 9 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section A

1. Mr. LEVY (Canada) said that it was at the outset of the arbitral process, though not necessarily at the first preparatory conference, when the parties were still prompted by good intentions, that they should agree on the procedure to be followed. Generally, it was the party that was dissatisfied with the award which resorted to delaying tactics in order to impede its enforcement. He described a case in which the award had been decided in London and was to have been enforced in Canada, and where the dissatisfied party had gone so far as to question the constitutionality of Canadian federal legislation and had even attempted to appeal the case before the Supreme Court of Canada in order not to pay the award to the other party. In order to prevent such problems from arising at the close of proceedings, the Guidelines should include provisions that would make it possible to reduce to a minimum delays and costs incurred by the abuse of judicial process and to guarantee the finality of the arbitral award by prohibiting appeals and facilitating enforcement.

2. In most States which had adopted the UNCITRAL Model Law, intervention by courts was limited to specific cases, such as interim measures, appointment of arbitrators in certain circumstances, challenge and dismissal of arbitrators or challenge of their competence and application to set aside an award on specific grounds. In some jurisdictions, including Canada, the powers of a court of law could not be curtailed in the absence of specific legislation. In others, the parties could explicitly agree to limit their right to appeal in a court of law. In that instance, the limitations provided for in the UNCITRAL Model Law constituted a good basis. In some cases, however, a written agreement would have little effect, in particular in the common law countries, where even a "privative clause" did not constitute effective protection when a court was determined to intervene. However, an agreement between the parties could be of some use.

3. Perhaps the best way to guarantee the finality of the award was to adopt a law that limited court appeals aimed at setting aside the arbitral award. Thus, the Act relating to commercial arbitration in Canada had incorporated the UNCITRAL Model Law into Canadian legislation. He read out article 34 of that Act, which echoed article 34 of the Model Law and stipulated that an arbitral award could be set aside by the court only if the party making the application furnished proof that it was under some incapacity or that it had not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

4. For such instances, the Guidelines could provide for a form of estoppel - a written stipulation in which the parties would state that they waived any right to appeal, thereby preventing the dissatisfied party from attempting to delay

the arbitral procedure or enforcement of the award. A stipulation of that sort would have good chances of being valid, even in the absence of legislation governing the question.

5. Mr. GRIFFITH (Observer for Australia) recalled that article 1 of the UNCITRAL Arbitration Rules stipulated that disputes were to be settled in accordance with those Rules subject to such modifications as the parties might agree to in writing. If the parties explicitly accepted the decisions adopted during preparatory conferences and confirmed that agreement in writing, that could constitute a sort of waiver with respect to any future objection and prevent subsequent disputes. He proposed that a sentence should be inserted in paragraph 34 of the draft Guidelines to the effect that, since the purpose of preparatory conferences was to establish certainty, the parties should explicitly accept the decisions adopted during the preparatory conferences and sign a document recording their agreement.

6. Mr. TUVAYANOND (Thailand), responding to an observation made by the representative of the United Sates of America with regard to paragraph 36, proposed that the word "fundamental" should be added at the end of the last sentence of that paragraph, which would then read: "... as a result of a fundamental change in circumstances".

7. Mr. HOLTZMANN (United States of America), referring to the statement made by the representative of Canada, agreed that the courts should respect the arbitral process and that their opportunities for intervention should be reduced to a minimum. It was with some envy that he recognized that Canadian law authorized parties to waive their right to recourse or to appeal in advance. However, he did not believe that such a waiver could be applied during a preparatory conference. Such conferences were called by arbitrators for the sole purpose of spelling out exactly what procedures would be adopted, and it would be highly inappropriate for the arbitrators to ask the parties at that stage to waive their right to challenge their decisions or even to ask questions regarding the enforcement of the award. It should be assumed that at that stage the parties were acting in good faith and ready to abide by the award. It might be in one party's interest to waive its right, but not in the other's. The party that chose to refuse to waive its right would then find itself in the uncomfortable position of having either to reject the proposal or invitation of the arbitrators, no matter how harmless it was, or to accept for fear of arousing the hostility of the very same individuals who were responsible for settling the dispute. Therefore, while the principle had some merits, it did not appear to be applicable to a preparatory conference.

8. The observer for Australia had rightly noted that if decisions were taken during a preparatory conference and the parties agreed to them, it was wise to record that agreement. However, one must be careful in drafting a provision to that effect not to undermine the principle which held that the agreement of the parties was not necessary to establish procedures, a task which fell to the arbitrators alone.

9. Mr. ZHANG Qikun (China) said that he agreed with the representatives of Thailand and the United States of America that the reference to the "substance of the dispute" in paragraph 33 should be deleted. The decisions taken at

preparatory conferences could relate only to procedure. It was inconceivable that a decision on a substantive question could be taken at a preparatory conference in the absence of one of the parties. Once that reference was eliminated, the square brackets could be removed.

10. Mr. CHATURVEDI (India) said that he agreed with the views of the representative of the United States of America regarding the Canadian proposal to exclude various questions from the jurisdiction of the courts. It was not the purpose of preparatory conferences to settle such questions. They should be settled by the parties themselves or within the framework of the applicable international conventions. Like other countries, India applied certain procedures for the submission of cases to court and also the provisions of international conventions, in particular the 1958 New York Convention, which were very useful for the enforcement of awards. Those questions should be resolved within the framework of domestic law; in any case, courts would never agree to give up their prerogatives. It was therefore inappropriate to include renunciation of the right of appeal among the questions which could be taken up at preparatory conferences.

11. With regard to the Australian proposal concerning paragraph 33, he agreed with the representative of China that the purpose of preparatory conferences was to consider purely procedural questions and certainly not substantive questions, particularly if for any reason one of the parties was absent at the time a decision was taken. Only procedural questions which the parties had not previously taken up could be considered in that context. The consent of the parties was the very underpinning of all arbitral proceedings.

12. Mr. CHOUKRI SBAI (Morocco) said that the problem of the right of appeal was complex. The approach to that question differed from one legal system to another. In Morocco, there was a model law based on respect for the regime of arbitration. Decisions of arbitrators could not be contested, either by means of an objection or through the appeals procedure. There were only three exceptions. First, the decision could be reviewed in the event that new evidence or new documents were produced, or if the arbitration had been based on documents that were false, invalid, or had lapsed. That possibility of review was also highly restricted in common law. Second, a third party not involved in the dispute could contest the decision if it affected his interests. Third, an arbitral award could not be enforced automatically; the common law judge had to be asked to enforce it. It was that decision of the common law judge that was subject to appeal. The judge never had the right to decide on substance. He had to ensure that the arbitrators' decision was not contrary to public order, that it was not null and void from the standpoint of the law to which it referred and that the rights of the defence had been fundamentally respected. He could not amend the arbitrators' decision. Morocco had ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards. Thus, the question of appeal was a thorny one: the solution varied from one country to another, and reference must also be made to the New York Convention in enforcing foreign decisions.

13. Mr. OLIVENCIA (Spain) said that the questions that could be taken up at preparatory conferences, which were a planning mechanism, should not relate to the substance of the dispute. However, there was another danger, and that was

that it would be possible to take up only procedural questions. Delegations had different views on that subject. Contrary to what had been said by representatives of the United States of America and China, some controversial questions such as the definition of issues to be taken up - what had to be proved, what the parties agreed on - were not solely procedural matters. Even if they did not constitute the substance of a case, they were linked to it, and certain aspects had to be established. That problem had a direct bearing on the question of the possibility of settlement (sect. III C) and defining questions and the order of deciding them (sect. III D). The question of what should be accepted by the parties - for example, that documents were authentic and valid - was not a procedural question but was important for the settlement of a dispute, and was the first thing on which the Commission must clearly define its position.

14. The difficult question of renouncing the right of appeal should not be taken up in the Guidelines. The Guidelines should be very clear for all legal systems within the limits authorized by domestic law. The representative of Morocco had made very pertinent comments in that respect. In Spain, it was a question which related to the most fundamental aspects of the rights of the defence and law and order. It was an extremely delicate question for Spain, and therefore his delegation was not in favour of including it in the text of the Guidelines.

15. Mr. CHATURVEDI (India) questioned whether the last sentence of paragraph 36 was really useful; he wondered why the adjectives "detailed" and "specific" had been used together.

16. Mr. TUVAYANOND (Thailand) said that his delegation did not entirely rule out the possibility of taking up substantive questions or even the question of the merits of the application at the preparatory conference, in so far as agreement on those questions could sometimes make it possible to accelerate the procedure or lead to a settlement of a dispute even before the arbitral proceedings began; however, all parties had to be present. Regarding renunciation of the right of appeal, he stressed that the parties always had the option of appealing in exceptional cases of ultra vires. Lastly, he felt that it would be useful to specify, at the end of paragraph 36, that a decision might have to be modified as a result of a "fundamental" change in circumstances.

17. Mr. ABASCAL ZAMORA (Mexico) said it was unrealistic to maintain that preparatory conferences should focus solely on form, because it was very difficult to determine where procedure ended and where substance began. The solution would be to delete paragraph 33 and to refer to the check-list, bearing in mind that that list was not exhaustive. In any event, questions relating to the substance or merits of a case should be handled very carefully.

18. Mr. GOH (Singapore) said that he would prefer it if section C included an indication that at a preparatory conference, the parties should, specifically decide to renounce their right of appeal. Arbitration was a choice made by the parties and they should abide by it, particularly since recourse procedures before courts involved expenses in addition to the already heavy costs of arbitration.

19. The CHAIRMAN, replying to the representative of Singapore, said that that was a delicate question because legal systems varied in different countries. He suggested that the Commission should take up paragraphs 37 to 39 and section A (Rules governing arbitral procedure) of chapter III (Annotated check-list of possible topics for a preparatory conference).

20. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said it was inconceivable that all the aspects in the check-list could be properly considered at the same stage and at the same conference. Items A (Rules governing arbitral procedure), B (Jurisdiction and composition of arbitral tribunal), J (Arrangements concerning written submissions), M (Language of proceedings) and P (Place of arbitration), for example, should be taken up at the very beginning of the procedure, while items E (Undisputed facts or issues) and L (Hearings) should be taken up at a much later stage. The various questions included under item L could be taken up only at a pre-hearing conference in the strict sense of the term. In order to guide inexperienced arbitrators, the Guidelines should contain information, either in the introduction to chapter III, or in the notes on each topic, or in both, concerning the stage at which the different items on the check-list should be taken up.

21. Mr. HOLTZMANN (United States of America) said that he supported the general comment made by the observer for the International Council for Commercial Arbitration without being as pessimistic. With regard to item A on the check-list, he felt that that subject should not be included in the agenda of a preparatory conference. His first objection was similar to that raised during the consideration of paragraphs 16 and 17 regarding modification of the arbitration rules agreed between the parties. The adoption of arbitration rules at that stage would necessarily mean applying some surgery to those rules, if only with respect to the modalities of the constitution of the arbitral tribunal, since the latter would have already been constituted. Moreover, where the parties had not agreed on arbitration rules, it might be assumed that they had done so on purpose, leaving it to the arbitral tribunal to establish the rules of procedure within the framework of the procedural law applicable to arbitration. It would also be difficult at that stage to adopt the arbitration rules of a particular institution, mainly because of the question of fees. Lastly, if it became clear that the parties could not agree on a set of arbitration rules, it would be very difficult for the arbitral tribunal to discontinue the discussion, as the secretariat proposed in the last sentence of paragraph 2, and it would not do so, for fear of creating dissensions between the parties or of appearing to be too authoritarian, unless the breakdown was complete, which meant risking the loss of a great deal of time.

22. Mr. OLIVENCIA (Spain), referring to paragraphs 37 to 39, said that the Guidelines ought to recommend that the agenda should be drawn up prior to the preparatory conference, that it should be the subject of prior consultations between the parties and that, except in special circumstances, the parties should adhere strictly to the agenda during the preparatory conference.

23. With regard to paragraph 39, his delegation reserved the right to speak on each of the topics covered in sections A to T when those topics were considered. For the time being, he wished to emphasize that the check-list of topics to be

considered at the preparatory conference could only be indicative: the topics would depend on the specific circumstances of the case, and more particularly on the phase of the proceedings in which the preparatory conference would be held. The Guidelines should clearly indicate to the parties that the choice of topics to be considered was subject to what was authorized by the applicable national law or by the arbitration rules which they had agreed to follow.

24. Mr. TUVAYANOND (Thailand) said that he agreed with the representative of Spain concerning the agenda. The agenda should be prepared in consultation with the parties, and no topic that was not on the agenda should be considered without the consent of all interested parties, even under the heading "Other matters".

25. Mr. ABASCAL ZAMORA (Mexico) proposed that the designation of an authority responsible for appointing the arbitrators should be added to the check-list of topics in paragraph 39. Even though the arbitral tribunal might already have been constituted at the time of the preparatory conference, it might become necessary to replace an arbitrator, and it was preferable to have decided beforehand how the replacement would be appointed. The UNCITRAL Arbitration Rules, which were widely used, also provided that such an authority could make a decision where an arbitrator withdrew and could be consulted on questions of costs. The authority could therefore play a major role in ad hoc arbitrations, particularly those carried out in accordance with the UNCITRAL Arbitration Rules.

26. The section on the choice of rules governing the arbitral procedure, on the other hand, did not appear to be indispensable. It was clear that where the parties had not agreed on such rules, it would be for the arbitral tribunal to decide which rules to apply. One argument, however, could be used to support the retention of that section: the fact that the Guidelines were mainly intended for parties and counsel who were unfamiliar with the issue that was being arbitrated.

27. Mr. LEVY (Canada) said that he shared the views expressed by the representative of the United States of America concerning the risks of raising with the parties themselves the question of the rules governing the arbitral proceedings. The Guidelines should contain no reference to the rules of other institutions.

28. Mr. CHATURVEDI (India) reminded the Commission that his delegation had suggested previously that the term "preparatory conference" should be replaced by "preparatory meeting". Similarly, he wished to suggest that the word "agenda" should be replaced by the word "topics".

29. In section A, the square brackets should be removed and the entire text retained. On the question of fees for the use of arbitration rules, which had been mentioned by the representative of the United States of America, the matter did not arise in the case of published rules, such as the UNCITRAL Arbitration Rules, which could be freely utilized and amended. The only rule which could be laid down was that the parties must be consulted beforehand on the topics to be considered during the preparatory conference. It should be for the arbitrators to make that decision. Similarly, the topics which had not been included in the

check-list could not be excluded if the circumstances of the case required that they should be considered, or if the parties or the arbitrators wished to consider them. At the end of section A, paragraph 2, the words "applicable procedural law" should be replaced by "applicable procedural law and rules". Finally, his delegation did not believe that the Guidelines should include the question of the designation of an authority responsible for appointing arbitrators, as the representative of Mexico had suggested.

30. The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

31. Mr. CHOUKRI SBAI (Morocco) said that he fully supported the views expressed by the representatives of Spain and Thailand concerning paragraphs 37 and 38. The agenda should be the object of preliminary consultations during which the arbitrators would also have the right to express their point of view and would permit the parties to express their views, thereby facilitating the arbitration process and saving time. Given the flexibility of that approach, the last sentence of paragraph 38 could be deleted. If it was decided to retain the sentence, however, then the phrase "if the arbitral tribunal considers it appropriate" should be deleted. The parties must decide for themselves which topics they wished to consider.

32. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that, for the reasons already given by the representative of the United States of America, he was in favour of deleting section A of the check-list.

33. Mr. LOBSIGER (Observer for Switzerland) said that, while he understood the objections of the representative of the United States of America concerning section A, he nevertheless felt that the arbitrators should seek to determine whether the parties were still unable at that stage to agree on a set of arbitration rules. Consequently, section A should not be deleted in its entirety. The comments of the representative of the United States of America must, however, be taken into account.

34. If there was no agreement on procedural rules, it might be difficult to reach agreement on the other sections of the check-list, particularly section F, concerning documentary evidence.

35. Mr. TUVAYANOND (Thailand) said that, in his country at least, it was virtually inconceivable that an arbitration agreement would not specify the applicable arbitration rules. If it did contain such a gap, however, it was essential for the parties to agree on the rules to be applied. That was why his delegation did not favour deleting section A, which it would prefer to see amended to indicate not that the arbitrators should try to determine whether the parties wished to agree on a set of arbitration rules but that the parties should agree on such rules.

36. Mr. AL-NASSER (Saudi Arabia) suggested that the wording of paragraph 37 should be amended by adding to the end of the second sentence the words "after consultation with the parties to the arbitration on the topics to be included in the agenda" and by deleting the last sentence. His delegation supported the proposal by the representative of Morocco to delete the phrase "if the arbitral

tribunal considers it appropriate" in paragraph 38. With regard to section A, he was inclined to think, like the representative of the United States of America, that it should be deleted. He would not object to its retention, however, if the section contained a reference to general principles of law.

37. Mr. BONELL (Italy) said that section A should be retained, subject to minor modification. Indeed, it was appropriate at the preparatory conference stage to draw the attention of parties to the fact that if they had not already done so, they would soon have to identify, at the very least, the rules that would govern the arbitral proceedings and to define various other rules of procedure and substantive rules, and that failure to do so would result in such decisions being taken by the arbitrators.

38. However, as the parties seemed still to be outside any framework of institutional arbitration, it would be useless to select a set of arbitration rules of an institutional arbitration mechanism. Yet there were other rules, including the UNCITRAL Arbitration Rules, which could be extremely useful at the current stage. In that connection, paragraph 2 of section A should probably be amended so as not to give the impression that the parties had to engage in possibly lengthy discussions in order to agree on a set of arbitration rules. The terminology should also be amended to make it clear that regardless of the current situation, all existing binding provisions would apply as usual, since the task at hand was not the choosing of the lex arbitra but rather the defining of rules similar to the UNCITRAL Arbitration Rules, for example.

39. Mr. OLIVENCIA (Spain) said that he, too, favoured retaining section A for several reasons. Firstly, it was clear that the section dealt with a hypothetical case in which the parties had not agreed on arbitration rules. Therein lay the usefulness of the Guidelines. It was unrealistic to think that the parties had overlooked that aspect of arbitration; neglecting to spell out in the arbitration agreement what set of arbitration rules would govern the arbitral proceedings was not the result of an oversight.

40. Secondly, the problem of the applicable law had yet to be resolved, for even if the parties referred to a national law in their arbitration clause or agreement, the national law might not require the parties to mention any specific rules of procedure in the arbitration clause or agreement. For instance, Spanish law only required parties to agree in the arbitration agreement to submit their disputes to one or more arbitrators and to enforce whatever arbitral award was decided. It stopped short of providing for procedures. However, the parties were well advised to plan the arbitral proceedings from the outset and to settle in particular such issues as deadlines and the order in which memorandums and counter-memorandums would be filed, and so forth, in the absence of arbitration rules even though they had strictly adhered to the provisions of the arbitration clause or agreement requiring them to specify the applicable law.

41. Mr. GRIFFITH (Observer for Australia), referring to paragraph 39, said that there was a contradiction between the idea in the second sentence that the check-list was intended to be complete and the comment in the penultimate sentence that the list was not exhaustive. He nevertheless hoped that that

would not prevent the Commission from considering the merits of any additions to the check-list that he might propose.

42. If the suggestion of the observer for the International Council for Commercial Arbitration to retain section A was accepted, it must be clearly stated either in a chapeau that would be part of paragraph 38 or paragraph 39 or, preferably, in a separate paragraph, that matters included in the check-list were for illustrative purposes only and not mandatory.

43. Mr. CHOUKRI SBAI (Morocco) agreed with the representatives of Saudi Arabia and the United States of America and noted that the primary function of the arbitral tribunal was to review arbitration agreements before turning to the settlement of disputes. It must determine the scope of its powers concerning procedural matters, the law applicable to disputes, and so forth.

44. Section A should be retained because it provided for an exceptional situation in which the parties had forgotten to spell out the procedure to be followed during arbitration, thus giving rise to various problems, since each arbitral tribunal tended to adopt its own approach to a specific case. For example, if the parties did not make any express provisions on the matter, certain arbitral tribunals applied the law of the host country while others applied the law of the chief arbitrator.

45. As far as the applicable law was concerned, some arbitration rules stipulated that disputes would be settled in accordance with the arbitration agreement concluded by the two parties and with the provisions of the law specifically or implicitly selected by them. However, there might well be cases in which the parties, when concluding the arbitration agreement, were unable to agree on the procedure to be followed, the substantive nature of the dispute, etc. In such cases, they could hold consultations in order to agree on methodology, in other words, to select the applicable law or request a body to settle the dispute in accordance with the principles of justice, or else to agree on a settlement. That was why section A should be retained.

46. Mr. LOBSIGER (Observer for Switzerland) agreed that in certain cases, despite the existence of a legitimate arbitration agreement, the parties were unable to agree on the rules governing the arbitral proceedings. Sometimes the choice of the parties was not clearly expressed, while in other instances the validity of the choice of the parties could not be challenged. Under those circumstances, a preparatory conference ought to be able to settle the question of whether the selection of the parties was valid and possibly other questions as well; sufficient time should be set aside for that purpose. Accordingly, the first part of the first sentence under section A, which read "If the parties have not agreed on arbitration rules", should be retained.

47. Mr. HOLTZMANN (United States of America) said that adopting a set of rules was easier to talk about than to do. He would hesitate to recommend to the parties to a dispute that they should adopt the UNCITRAL Arbitration Rules during the preparatory conference in the event that they had not concluded an arbitration agreement because of the enormous difficulties inherent in extracting from those Rules the only provisions likely to be applicable at that stage.

Chapter III, section B

48. Mr. ZHANG Qikun (China) said that preparatory conferences afforded an opportunity to ask the parties whether they had divergent views regarding the jurisdiction and composition of the arbitral tribunal. Even when such conferences were not necessary, the arbitrators were supposed to inquire whether the parties, especially the defending parties, had any objections as to the jurisdiction or composition of the tribunal.

49. It should also be established as quickly as possible that there were no challenges to the jurisdiction and composition of the tribunal in order to prevent either party from raising such issues later as a ploy to delay the enforcement of the arbitral award.

50. Therefore, his delegation proposed deleting the square brackets in section B and considering the jurisdiction and composition of the arbitral tribunal as issues that had to be included in the agenda of the preparatory conference.

51. Mr. TUVAYANOND (Thailand) said that while he agreed with the representative of China that section B was useful, he would prefer to speak of the "mandate" rather than the "jurisdiction" of the tribunal because the questions of the applicable substantive law and whether or not the arbitral tribunal would be empowered to invoke equity, all of which were linked more to the tribunal's mandate rather than to its jurisdiction, had yet to be settled. Nevertheless, section B was necessary because it allowed either party to call attention, for example, to any irregularities it believed had occurred in the selection of arbitrators.

The meeting rose at 1.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 535th MEETING

Held at Headquarters, New York,
on Thursday, 9 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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ELECTION OF OFFICERS (continued)

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

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The meeting was called to order at 3.10 p.m.

ELECTION OF OFFICERS (continued)

1. The CHAIRMAN announced that Mr. Choukri Sbai (Morocco), Mr. Abascal Zamora (Mexico) and Mr. Glatz (Hungary) had been elected Vice-Chairmen of the Commission, representing the African, Latin American and Eastern European States respectively.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392; A/CN.9/XXVII/CRP.2 and Add.1-3)

UNCITRAL Model Law on Procurement of Goods and Construction and Guide to Enactment of that Law (continued)

Procurement of services (continued)

2. The CHAIRMAN submitted to the Commission for adoption the text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services as amended by the drafting group on the basis of suggestions put forward during the deliberations (A/CN.9/XXVII/CRP.2 and Add.1-3).

A/CN.9/XXVII/CRP.2

Preamble and chapter I

3. The CHAIRMAN explained that the text of the preamble and articles 1 to 5, 7 to 13 and 15 as contained in document A/CN.9/392 had not been amended. Article 6 contained some changes and articles 11 bis and 11 ter would be renumbered once the Commission had adopted the text in full. Article 14 had been slightly modified in order to bring it into conformity with what the scope of the Model Law would be after procurement of services was incorporated.

4. Mr. CHATURVEDI (India) noted that the reference to subparagraph (f) of article 41 ter had been omitted from article 7, paragraph 3 (b) (ii).

5. Mr. LEVY (Canada) recalled that the Commission had agreed that the question was not one of substance but rather of editing, as the same text was contained in subparagraph (a) (iii) of that same paragraph.

6. Mr. WALLACE (United States of America) observed that, according to the draft report, the question had been referred to the drafting group.

7. Mr. CHATURVEDI (India) insisted that there had been no reason to delete that text.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the preamble and chapter I.

9. It was so decided.

Chapter II

10. Mr. GRIFFITH (Observer for Australia) said that, in his view, the footnote which had been added following the consideration of article 16 appeared to undermine the principle that the text which now covered services should in no way affect the application of the original text on procurement of goods and construction. It might even dissuade States from adopting the whole menu of options available for the procurement of services. As a compromise solution, he suggested deleting the first two sentences of the footnote and simply stating: "States may choose not to incorporate all of those methods into their national legislation". A reference should then be made to the relevant paragraphs of the Guide to Enactment. He hoped that a special paragraph would be added to the Guide on procurement of goods and construction, indicating that chapter III bis could also be used in the case of services.

11. Ms. VERRALL (United Kingdom) expressed support for including a footnote on article 16 in order to stress that States were not obligated to promulgate the whole menu. In no case should the text already adopted be affected or amended. Any remaining doubts should be dispelled by deleting the first two sentences and perhaps even the entire footnote. If that was done, perhaps a simple, direct footnote could be included, referring promulgating States to those paragraphs of the Guide which dealt with the question in greater detail.

12. Mr. WALLACE (United States of America) said that it would be a shame to delete the footnote, which was the fruit of painstaking deliberations. If the text of the Model Law was moved to the Guide, the Commission would never see the final text, which was not a satisfactory method. He therefore requested that, at least on that question, the Commission should have before it those paragraphs of the Guide which contained the text that had been deleted from the cover page of the Model Law.

13. Mr. LEVY (Canada) said that he had suggested including the footnote in order to clarify a question of concern to a number of delegations. From the outset, Canada had pointed out that the text of the Model Law offered a wide range of options and that States were not obligated to incorporate all of them. In any case, the footnote was not part of the Law and so had no legal value. He therefore agreed to its deletion, despite the fact that it provided a useful explanation for the parties, who would surely not read the Guide immediately. If the footnote was included, he would wish to retain the last two sentences of the current footnote and add: "States may choose not to incorporate all of those methods into their national legislation. On this question, see paragraphs __ to __ of the Guide to Enactment".

14. Mr. CHATURVEDI (India) said he felt that a footnote should simply convey the idea, which had been accepted by the Commission, that States were not obligated to incorporate all the methods of procurement set out in the Model Law into their national legislation. The last sentence of the footnote on the cover page of document A/CN.9/XXVII/CRP.2/Add.3 would also have to be deleted, for no reference whatsoever should be made to the Guide to Enactment, which was a separate document.

15. Mr. TUVAYANOND (Thailand) said that the footnote agreed to by the Commission should be retained in order to suggest to Governments that they did not need to incorporate all methods of procurement into their national legislation. Each State should choose those methods best suited to its specific situation. If the wording could be changed to reflect that, there would be no problem in leaving the text as it was.

16. Mr. LOBSIGER (Observer for Switzerland) expressed a preference for retaining the footnote, whose formulation by the drafting group was adequate. It would also be useful to the reader of the text.

17. Mr. MELAIN (France) said that he was in favour of retaining the footnote, if only for purposes of information, and that it should explain why States were given the option of not incorporating all methods of procurement, rather than simply referring to the Guide. He suggested deleting the first two sentences and retaining the last two so that it would be clear that States could choose not to incorporate all methods.

18. Mr. WALLACE (United States of America) agreed with the representative of France that the penultimate sentence of the footnote should state exactly why States were being advised that they could choose not to incorporate all methods of procurement in their national legislation.

19. Mr. TUVAYANOND (Thailand) said that the footnote should be retained so that the text of the Model Law itself would include a clear reference to the Commission's intention. It was not sufficient to refer to the Guide, which was a separate document and might not be accessible to everyone who read the Model Law.

20. Mr. GRIFFITH (Observer for Australia) agreed with the representative of Thailand, adding that, during the current session, the Commission ought to consider the part of the Guide that dealt with the question under discussion.

21. The CHAIRMAN said that the secretariat would make every effort to circulate the relevant portion of the Guide in the days that followed.

22. Mr. CHATURVEDI (India) said that a reference to the Guide should not be included since the Commission had not reviewed it.

23. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to retain the reference to the Guide, provided that the text of the relevant part of that document was distributed before the end of the current session.

24. It was so decided.

25. The CHAIRMAN said that articles 17 to 20, which had been expanded to include services, presented no great problems. The same was true of chapter III, "Tendering proceedings" (arts. 21 to 35), and chapter IV, "Procedures for procurement methods other than tendering" (arts. 36 to 41), although those paragraphs might have to be renumbered when the Commission took up the inclusion of the additional chapter it had already agreed on. If he

heard no objection, he would take it that the Commission wished to adopt the first report of the drafting group (A/CN.9/XXVII/CRP.2).

26. It was so decided.

A/CN.9/XXVII/CRP.2/Add.1

27. Mr. TUVAYANOND (Thailand) said that, without prejudice to the adoption of the report contained in document A/CN.9/XXVII/CRP.2, the title of the Model Law, which referred to "procurement of goods, construction and services", should perhaps be changed as there was already an almost identical model law on procurement of goods and construction, which might give rise to the belief that a State could incorporate the latter into its national legislation without taking the former into account. He suggested that the draft Model Law before the Commission should be limited to the procurement of services, which would make it clear that the first model law applied to the procurement of goods and construction. That procedure was similar to the one adopted with respect to the law of treaties, in which treaties between States and treaties between international organizations or between international organizations and States were dealt with in separate conventions. There, too, the texts were very similar, although not identical.

28. Mr. WALLACE (United States of America) said that that suggestion might be taken up in the text of the footnote and pointed out that the adoption of document A/CN.9/XXVII/CRP.2 did not mean that the title of chapter IV had also been adopted.

29. The CHAIRMAN agreed with the representative of the United States of America that the new title of chapter IV should be considered separately.

30. Mr. GOH (Singapore), supported by Mr. LEVY (Canada), said that in order to avoid the possible confusion pointed out by the representative of Thailand, reference should be made to the year of adoption of the Model Law. Its title would then become "UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994".

31. Mr. HERRMANN (Secretary of the Commission) pointed out that if the year of adoption was included in the title of the Model Law it might be thought that it replaced the UNCITRAL Model Law on Procurement of Goods and Construction of 1993.

32. Mr. GOH (Singapore) suggested that reference should be made to the year of adoption; in order to solve the problem raised by the Secretary, it should be explained in the footnote on the first page of document A/CN.9/XXVII/CRP.2/Add.1 that the new Model Law did not replace the Model Law of 1993.

33. Mr. CHATURVEDI (India) said that the Secretary of the Commission was right. In any case, however, whenever the Model Law was referred to, the year of its adoption would be included, whether or not it appeared in the title. He proposed that a new sentence should be added before the last sentence of the footnote, to read: "The Model Law on Procurement of Goods, Construction and Services of 1994 does not amend that of 1993." He also wondered whether the

note should not read "adopted by the General Assembly" rather than "adopted by the Commission".

34. Mr. LEVY (Canada) agreed with the representative of India with respect to the title but suggested that the last part of the proposed sentence should read "but is not intended to supersede it".

35. Mr. HERRMANN (Secretary of the Commission) said that the footnote should not refer to adoption of the Model Law by the General Assembly, as the Assembly did not usually adopt texts prepared by the Commission but simply congratulated it on completing its preparation of a text and, in the case of a draft convention, recommended that a plenipotentiary conference should be convened to sign it or, in the case of a model law, recommended its adoption by Member States.

36. Mr. WALLACE (United States of America) said that it would be better to delete the words "which has now been expanded to include procurement of services" in the second sentence of the footnote and add a new sentence reading "This Model Law on Procurement of ... adds provisions on the procurement of services." That wording would also avoid the problem raised by the Secretary of the Commission.

37. Mr. LEVY (Canada) said it should be explicitly stated in the footnote that the new Model Law did not replace that of 1993.

38. Mr. CHATURVEDI (India) said that he could accept either the United States or the Canadian proposal provided that the phrase "but does not amend the UNCITRAL Model Law on Procurement of Goods and Construction for those States which wish to adopt it" was added to either wording.

39. Mr. AL-NASSER (Saudi Arabia) proposed that the title should read "Model Law adopted by UNCITRAL after inclusion of the procurement of services in the UNCITRAL Model Law on Procurement of Goods and Construction pursuant to a decision taken by the Commission at its twenty-sixth session."

40. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer the drafting of the footnote to the drafting group.

41. It was so decided.

Article 11 (i) ter

42. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to adopt article 11 (i) ter.

43. It was so decided.

Chapter III bis, article 41 bis

44. Mr. WALLACE (United States of America), referring to paragraph 3 of article 41 bis, said that it would be useful to explain briefly in the Guide what was meant by direct solicitation, as the Commission had not considered that

question. Moreover, the article did not specify that suppliers or contractors were to be excluded when the method of direct solicitation or notice was used or what the procuring entity should do if the services were offered by suppliers or contractors which had been informed of the solicitation or notice but had not responded to it. It might be useful for the Guide to include some direction for that case.

45. Mr. SHI Zhaoyu (China) said that the title of chapter III bis still did not state clearly the purpose of the articles contained in it, as it suggested that there was one standard method of procurement and that another special method was adopted when the first could not be applied, instead of making it clear that the method indicated in the chapter was to be given preference.

46. Mr. CHATURVEDI (India) agreed that the Guide should explain what was meant by "direct solicitation of proposals".

47. Mr. TUVAYANOND (Thailand) said that it appeared from the title that chapter III bis referred to a special method for procurement of services which was used only in special circumstances while the usual method would be tendering.

Article 41 ter

48. Mr. WALLACE (United States of America) said that article 41 ter, subparagraph (1), only referred to article 41 sexies, paragraph 1 (a), whereas it ought to say whether the method chosen was that of the lowest price, set out in article 41 sexies bis, paragraph 2 (a), or that of the best proposal in terms of criteria other than price, set out in article 41 sexies bis, paragraph 2 (b).

Article 41 quater

49. Mr. CHATURVEDI (India) proposed that the words "of local people" should be added after the words "the development of managerial, scientific and operational skills" in paragraph 1 (d).

50. Mr. LEVY (Canada) said that the word "local" was confusing as it was unclear whether it referred to a city, a county, a state or a country.

51. Mr. CHATURVEDI (India) said that if the expression "local people" posed a problem, the expression "local experts" could be used.

52. The CHAIRMAN pointed out that it was not for the Commission to introduce substantive changes to the Model Law. If he heard no objections, he would take it that the Commission wished to adopt the second report of the drafting group (A/CN.9/XXVII/CRP.2/Add.1).

53. It was so decided.

A/CN.9/XXVII/CRP.2/Add.2

Article 41 sexies

54. Mr. CHATURVEDI (India) said that in paragraph (3) the word "external" had been added before the word "experts"; that constituted a modification of the text initially approved.

55. The CHAIRMAN explained that the drafting group had agreed to include the word "external" to solve the problems that the text posed for the World Bank.

56. Mr. WALLACE (United States of America) said that, for the World Bank, the independence of the experts had to do with the contracting process, not with whether they were citizens of another country. The drafting group should bear that in mind.

Article 41 sexies ter

57. Mr. WALLACE (United States of America) noted that it was stated in the fourth line of paragraph 1 that the proposals had to be "acceptable"; he did not recall the Commission having agreed to that term. Other articles contained references to a "minimum level", an expression which seemed much more useful.

58. Mr. LEVY (Canada) said he had proposed the word "acceptable" thinking that it had more positive connotations than the expression "which have not been rejected". Also, the expression "minimum level" referred to the proposals, not to those who formulated them. Even if a proposal attained a given level, it was possible to have no confidence in the person who had made it.

59. Mr. WALLACE (United States of America) said that, according to article 41 sexies bis, paragraph 1, the procuring entity would establish a minimum level with respect to quality and technical aspects. According to article 41 sexies quater, subparagraph (a), the procuring entity would establish a minimum level in accordance with article 41 sexies bis, paragraph 1. In other words, the minimum level referred to quality and technical aspects. Therefore, if that concept was valid for article 41 sexies bis, it would also be valid for article 41 sexies quater and article 41 sexies ter. If that expression was used in all those articles, the text would be coherent.

The meeting was suspended at 5.10 p.m. and resumed at 5.40 p.m.

60. The CHAIRMAN, referring to the problem which had arisen because of the replacement in the text prepared by the drafting group of the term "threshold" by the expression "minimum level", said that some delegations had thought that the level to be fixed would be too low. He did not share that view, since in his opinion the minimum level would be established by the procuring entity. The problem had been resolved to a certain extent by the provision establishing the conditions to be met by proposals submitted to the procuring entity.

61. Mr. GRIFFITH (Observer for Australia), supported by Mr. CHATURVEDI (India), pointed out that if there were currently difficulties in reconciling different positions, it would be best to leave the text as it was.

62. Mr. WALLACE (United States of America) said that, although he could accept Australia's suggestion, he had been referring to article 41 sexies ter, paragraph 1, which meant that the question was a substantive one. He suggested getting around the problem by rewording the paragraph to which he had referred to read "The procuring entity shall engage in negotiations with suppliers or contractors that have submitted proposals which attain a minimum level with respect to quality and technical aspects."

63. Mr. LEVY (Canada) said that the wording proposed by the representative of the United States of America entailed a substantive question, since the threshold concept was being introduced into a provision in which it had not been present. If there was any disagreement, it would be best to keep to the text contained in document A/CN.9/XXVII/CRP.2/Add.2, which was the one prepared by the drafting group.

64. Mr. CHATURVEDI (India) supported the suggestion made by the representative of the United States of America, which he considered logical since article 41 sexies bis, paragraph 1, already contained the expression "minimum level".

65. Mr. GOH (Singapore) also supported the United States proposal and recalled that, originally, the concept of a threshold with respect to quality and technical aspects had been used in article 41 sexies.

66. Mr. BONELL (Italy) also thought that the question was a substantive one. The history of article 41 sexies ter, paragraph 1, indicated that the draft had originally referred to proposals which had not been rejected. That situation was different from the one in article 41 sexies bis and sexies quater, which expressly recognized that a minimum level must be established. That was why it was subsequently stated that, having chosen the procedure, the procuring entity must establish that minimum level, but that did not appear in article 41 sexies ter. Thus, if the present wording was changed, it would be necessary to restructure the whole paragraph and make it consistent with the other procedure.

67. Mr. TUVAYANOND (Thailand) said the text should refer to the proposals which had not been rejected, since it would be meaningless to open negotiations on proposals which had already been rejected.

68. The CHAIRMAN suggested retaining the original text of document A/CN.9/XXVII/CRP.2/Add.2 and including an article entitling the procuring entity to determine the characteristics of the proposals that merited consideration.

69. Mr. WALLACE (United States of America) said that the choice between referring to a minimum level and referring to acceptable proposals or to those which had not been rejected was a substantive question which his delegation had been right to bring up. He also pointed out that the word "threshold", which had been used initially, stated the concept they were trying to express more precisely.

The meeting rose at 6.05 p.m.